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Article 5

Torts-Contribution Among Joint Tortfeasors-Effect of Partial Release on Pro Rata Allocation of Liability

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RECENT DEVELOPMENTS

Torts—Contribution Among Joint Tortfeasors—Effect of Partial Release on Pro Rata Allocation of Liability

New York General Obligations Law § 15-108 (McKinney Supp. 1972)
Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972)

At common law, the tort rule that a release given to one wrongdoer operated to release the liability of all others was restricted in application to true joint tortfeasors,[1] *i.e.*, those acting in concert.[2] Since each tortfeasor by virtue of the relationship became jointly and severally liable for the injury sustained,[3] it was not unreasonable to hold that a release extinguished an injured party's solitary cause of action.[4] Moreover, since the release was generally made by deed under seal,[5] questions of sufficient consideration were never raised.[6]

Later case law considerably broadened the application of the original rule.[7] Both concurrent and successive independent tortfeasors,

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1 *See* Cocke v. Jennor, 80 Eng. Rep. 214 (K.B. 1614); W. Prosser, Handbook of the Law of Torts § 49, at 301 (4th ed. 1971); 63 Colum. L. Rev. 1142, 1143 (1963).

2 Strictly speaking, the words "joint tort" should be used only where the behavior of two or more tort-feasors is such as to make it proper to treat the conduct of each as the conduct of the others as well. In effect this requires the existence of a concert of action or the breach of a joint duty.

1 F. Harper & F. James, The Law of Torts § 10.1, at 692 (1956).

3 *See* Heydon's Case, 77 Eng. Rep. 1150 (K.B. 1613); 1 F. Harper & F. James, *supra* note 2, § 10.1, at 692.

4 The injury inflicted by joint tortfeasors gave rise to a single cause of action, although the plaintiff could proceed against fewer than all of those involved. Since each individual was charged with the total wrongdoing, it is apparent that a discharge of one properly effected a discharge of all persons liable. *See* Brinsmead v. Harrison, L.R. 7 C.P. 547 (1872); Cocke v. Jennor, 80 Eng. Rep. 214 (K.B. 1614).

5 *See* Bronson v. Fitzhugh, 1 Hill 185 (N.Y. Sup. Ct. 1841); Havighurst, *The Effect of a Settlement with One Co-Obligor upon the Obligations of the Others*, 45 Cornell L.Q. 1, 3 (1950).

6 *See* W. Prosser, *supra* note 1, § 49, at 301; 1 S. Williston, Contracts § 205 (3d ed. 1957).

7 Professors Harper and James maintain that the extension of the term joint tortfeasor to include other than conspirators is attributable to confused thinking in the courts. Originally, procedural joinder and joint and several liability were interchangeable concepts. In fact, *only* those tortfeasors who were jointly and severally liable under the substantive law could be joined as defendants. When early codes sought to introduce reform to achieve procedural convenience, the concept of procedural joinder became detached from substantive liability. As a result, joinder was allowed not only where there had been action in concert, but also where the independent concurring wrongs of several tortfeasors

as well as true joint tortfeasors, were permitted to raise release as a defense.[8] Although this resulted in a theoretical contradiction[9] since one rationale of the rule was that only a single cause of action existed,[10] most courts refused to recognize any inconsistency.[11] Instead, they acted to bolster the effectiveness of the release by creating a presumption that the injured party had received complete satisfaction for his injury

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had caused a single indivisible injury and damage could not be apportioned. However, since the parties were joined as joint tortfeasors, their liability was regarded as being joint and several. The procedural tail thus wagged the substantive dog. *See* 1 F. HARPER & F. JAMES, *supra* note 2, § 10.1, at 695-97.

8 *See* Parchefsky v. Kroll Bros., 267 N.Y. 410, 196 N.E. 308 (1935); Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934); Bronson v. Fitzhugh, 1 Hill 185 (N.Y. Sup. Ct. 1841). The rationale for this application of the rule is best stated by the court in Milks v. McIver, *supra*:

> It may be argued that the original wrongdoer who caused the injury and the physician whose negligence aggravated the injury are not, in technical sense, joint tortfeasors. Nevertheless their wrongs coalesced and resulted in damage which would not have been sustained but for the original injury.

264 N.Y. at 269, 190 N.E. at 488. As a result, parties were permitted to raise the defense of release where the relationship was that of master-servant. *See* Kinsey v. William Spencer & Son Corp., 165 Misc. 143, 300 N.Y.S. 391 (Sup. Ct. 1937), *aff'd mem.*, 255 App. Div. 995, 8 N.Y.S.2d 529 (2d Dep't 1938), *aff'd mem.*, 281 N.Y. 601, 22 N.E.2d 168 (1939); Gavin v. Malherbe, 146 Misc. 51, 261 N.Y.S. 373 (Sup. Ct. 1932), *aff'd mem.*, 240 App. Div. 779, 266 N.Y.S. 897 (2d Dep't 1933), *aff'd mem.*, 264 N.Y. 403, 191 N.E. 486 (1934). The defense was also available in driver-owner situations. *Cf.* Sarine v. American Lumbermen's Mut. Cas. Co., 258 App. Div. 653, 17 N.Y.S.2d 754 (2d Dep't 1940).

For more extensive discussion of the effect of release on the liability of a tortfeasor, see generally Havighurst, *supra* note 5; 63 COLUM. L. REV. 1142 (1963); 31 FORDHAM L. REV. 836 (1963); 14 SYRACUSE L. REV. 526 (1963); 31 U. CIN. L. REV. 489 (1962); Annot., 73 A.L.R.2d 403 (1960).

9 *See* Derby v. Prewitt, 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962). The essential difficulty is that where the tortfeasors have acted independently and successively, as where a physician aggravates the original injury inflicted, the plaintiff clearly has two distinct causes of action. Since he can proceed against the original wrongdoer and collect for the harm he caused and still proceed against the physician for the additional damage, it is simply inconsistent to reason that a release given to the original wrongdoer releases the physician as well on the grounds that there is but one cause of action. What perhaps generated such confused thinking is the ability of the injured party to hold the original wrongdoer liable for all the damages which result. *See* Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958); Parchefsky v. Kroll Bros., 267 N.Y. 410, 196 N.E. 308 (1935).

10 *See, e.g.*, Lucio v. Curran, 2 N.Y.2d 157, 139 N.E.2d 133, 157 N.Y.S.2d 948 (1956); Walsh v. New York Cent. & H.R.R.R., 204 N.Y. 58, 97 N.E. 408 (1912); *cf.* Duck v. Mayeu, [1892] 2 Q.B. 511.

Other reasons advanced in support of the rule include (*1*) that the instrument should be strictly construed against the releasing party, (*2*) that the claimant should be limited to one recovery, and (*3*) that a partial release creates problems in the law of contribution. *See* Havighurst, *supra* note 5, at 3-7.

11 *See* W. PROSSER, *supra* note 1, § 49, at 301; Annot., *supra* note 8. This position, however, has been the subject of considerable criticism, both in the courts and in the commentaries. *See, e.g.*, McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Breen v. Peck, 28

even where the release was not under seal.[12] Ostensibly, this ensured that only one satisfaction could be had for the damage incurred.[13]

Plaintiffs' attempts to mitigate the severity and rigidity of this rule resulted in the creation of a host of judicial exceptions. Among the primary artifices employed were the covenant not to sue[14] and the release with express reservation.[15] These devices effectively permitted an injured party to accomplish indirectly that which was prohibited

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N.J. 351, 146 A.2d 665 (1958); 1 F. HARPER & F. JAMES, *supra* note 2, § 10.1, at 711-14; 2 S. WILLISTON, *supra* note 6, § 338A, at 722-25; Havighurst, *supra* note 5, at 4-5; 17 ILL. L. REV. 563 (1924); 31 U. CIN. L. REV. 489, 493 (1962).

12 *See, e.g.*, Rector of St. James Church v. City of New York, 261 App. Div. 614, 26 N.Y.S.2d 762 (2d Dep't 1941); Shaw v. Crissey, 182 Misc. 27, 43 N.Y.S.2d 237 (Sup. Ct. 1943); 63 COLUM. L. REV. 1142, 1144 (1963).

13 *See, e.g.*, Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934); Walsh v. New York Cent. & H.R.R.R., 204 N.Y. 58, 97 N.E. 408 (1912); Barrett v. Third Ave. R.R., 45 N.Y. 628 (1871). It is again suggested that this result is attributable to confused thinking. Whereas a release is the abandonment of a claim against a party, a satisfaction is the full compensation accepted for injuries received. Since a release can be partial and/or gratuitously given, it is clear that although all satisfactions create a release, all releases do not indicate full satisfaction. *See* 1 F. HARPER & F. JAMES, *supra* note 2, § 10.1, at 711.

One consequence of the presumption that a release indicates a full satisfaction of a claim has been the holding that the effect of a release cannot be avoided because of lack of knowledge of the existence of a cause of action. *See* Lucio v. Curran, 2 N.Y.2d 157, 139 N.E.2d 133, 157 N.Y.S.2d 948 (1956); Kirchner v. New Home Sewing Mach. Co., 135 N.Y. 182, 31 N.E. 1104 (1892); Leonard v. Gottlieb, 278 App. Div. 786, 104 N.Y.S.2d 75 (2d Dep't 1951). This is true, of course, only in the absence of fraud. McNamara v. Eastman Kodak Co., 232 N.Y. 18, 133 N.E. 113 (1921); Kirchner v. New Home Sewing Mach. Co., *supra*.

14 The covenant not to sue, unlike a release, does not extinguish the cause of action; rather, it is an enforceable promise by the maker not to sue on his claim against the covenantee. Although not technically a defense against later suit, it has been so regarded in order to prevent circuity of action. *See* 4 A. CORBIN, CONTRACTS § 932, at 744 (1951); 2 S. WILLISTON, *supra* note 6, § 338, at 710-11. The device and the reasoning involved have been severely criticized for their artificiality. *See* McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Havighurst, *supra* note 5, at 7-9.

15 The release with reservation theoretically allows the plaintiff to split his cause of action. Thus, this exception is prohibited in jurisdictions which firmly adhere to the doctrine that the plaintiff possesses a single cause of action against all tortfeasors. *See, e.g.*, Muse v. DeVito, 243 Mass. 384, 137 N.E. 730 (1923). New York courts, however, simply regard such a release as the equivalent of a covenant not to sue. *See, e.g.*, Plath v. Justus, 28 N.Y.2d 16, 268 N.E.2d 117, 319 N.Y.S.2d 433 (1971); Gilbert v. Finch, 173 N.Y. 455, 66 N.E. 133 (1903). Other situations in which the courts have refused to regard a release as affecting the liability of others include: (*1*) when the release was given to a party not in fact liable for the injury (*see, e.g.*, Littell v. Cranford Co., 203 N.Y.S.2d 975 (Sup. Ct. 1960)); (*2*) when the release was intended only as a partial satisfaction (*see, e.g.*, Gaylor v. Burroughs, 248 App. Div. 915, 290 N.Y.S. 679 (2d Dep't 1936), *aff'd mem.*, 273 N.Y. 606, 7 N.E.2d 716 (1937)); (*3*) when there was no claim in existence to be released at the time the release was given (*see, e.g.*, Wilder v. Pennsylvania R.R., 245 N.Y. 36, 156 N.E. 88 (1927)); and (*4*) when the successive tortfeasor caused a new and separate injury. *See, e.g.*, Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934).

directly. Yet, despite these exceptions, numerous laymen inadvertently continued to sign away their rights.[16]

In the event plaintiff or his counsel was shrewd enough to take advantage of an available exception, full satisfaction of the claim necessarily resulted in inequitable distribution of liability among the remaining tortfeasors.[17] Especially where the release was gratuitous or for nominal consideration, the public policies of risk distribution and fundamental fairness were greatly impeded.[18] Since the released party could not be impleaded under third-party practice,[19] no right to contribution existed for the nonsettling tortfeasor.[20] The latter would have to assume the full burden of liability, regardless of the measure of his fault.[21]

16 The release rule has been greatly criticized as being a trap for the unwary. *See* Derby v. Prewitt, 12 N.Y.2d 100, 104, 187 N.E.2d 556, 558, 236 N.Y.S.2d 953, 957 (1962). It is apparent from the cases that this includes unwary counsel as well. *See, e.g.*, Lucio v. Curran, 2 N.Y.2d 157, 139 N.E.2d 133, 157 N.Y.S.2d 948 (1956).

17 Unless the release discharges the full pro rata share of the liability attributable to the releasee, the releasor in effect causes the nonsettling tortfeasors to bear this burden. *See* Annot., 20 A.L.R.2d 1044 (1951). An attempt to prevent this result is evidenced by the provision in the Uniform Contribution Among Tortfeasors Act stating that a release given by the plaintiff reduces his claim against remaining tortfeasors by the consideration paid or the releasee's pro rata share of the liability, whichever is greater. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1939 version). This, however, was changed in the revised act in order to promote settlements. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1955 version); *cf.* notes 38-40 and accompanying text *infra.*

18 The importance of these policies was markedly demonstrated in Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). In an effort to terminate objectionable practices contrary to these policies, the New York Court of Appeals substantially rewrote the law of contribution among tortfeasors. *See* notes 45-59 and accompanying text *infra.*

19 *See* Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 453, 158 N.E.2d 691, 694, 186 N.Y.S.2d 15, 20 (1959); Fox v. Western N.Y. Motor Lines, Inc., 257 N.Y. 305, 307-08, 178 N.E. 289, 289-90 (1931). Impleader is proper only when the third party is viewed as liable or possibly liable to the defendant. *See* N.Y. CIV. PRAC. LAW § 1007 (McKinney 1963). The right to contribution, however, arose only after a judgment was obtained. *See* note 20 *infra.*

20 In order to come within the ambit of N.Y. CIV. PRAC. LAW § 1401 (McKinney Supp. 1972), which governs the right to contribution, it is necessary that (*1*) a joint money judgment be recovered against two or more defendants by plaintiff, and (*2*) plaintiff's judgment actually be satisfied, one defendant paying more than his pro rata share. *See* 2A J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 1401.01 (1972). Interpreting this section, courts uniformly have been strict constructionists. *See, e.g.*, Baidach v. Togut, 7 N.Y.2d 128, 164 N.E.2d 373, 196 N.Y.S.2d 67 (1959) (predecessor section); Ward v. Iroquois Gas Corp., 258 N.Y. 124, 179 N.E. 317 (1932) (predecessor section).

21 The sole exception to the prohibition against use of third party practice to effect a shifting of liability among tortfeasors was where a passively negligent party sought recovery from an actively negligent tortfeasor. Since the action was for indemnification, third party practice was permitted. *See* Bush Terminal Bldgs. Co. v. Luckenback S.S. Co., 9 N.Y.2d 426, 174 N.E.2d 516, 214 N.Y.S.2d 428 (1961); Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 158 N.E.2d 691, 186 N.Y.S.2d 15 (1959); McFall v. Compagnie Maritime Belge (Lloyd Royal) S.A., 304 N.Y. 314, 107 N.E.2d 463 (1952).

In 1928, New York sought to alleviate the severity of the common law rules of release by the almost total adoption[22] of the Model Joint Obligations Act.[23] Both tort and contract claims were subject to the provision that a general release would not result in the complete discharge of other obligors,[24] since the statute defined "obligation" to include both tort and contract liability.[25] Instead, the obligee's claim was reduced by the pro rata share for which the releasee would otherwise have been liable.[26] This protection afforded the tortfeasor, however, applied only where the plaintiff made no express reservation of rights. Where reservation was express, co-obligors were credited only with that consideration actually given for the release.[27]

Despite the seemingly unambiguous language of the statute,[28] several lower New York courts viewed the provisions as having only restricted application in situations in which the obligation was in tort, regarding the common law rule as avoided only where the tort damages had been liquidated prior to release.[29] Otherwise, it was reasoned, no precise pro rata reduction of the claim could be calculated. The New York Court of Appeals adopted this construction of the statutory language just prior to its amendment in 1972, thereby settling a conflict among the lower courts that had existed for many years.[30]

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22 Debtor & Creditor Law §§ 231-40, ch. 833, §§ 231-40, [1928] N.Y. Laws 1764 (repealed 1964). The same material is now substantially covered by N.Y. GEN. OBLIG. LAW §§ 15-101 to -110 (McKinney 1964 & Supp. 1972).

23 MODEL JOINT OBLIGATIONS ACT (1925).

24 Debtor & Creditor Law § 235, ch. 833, § 235, [1928] N.Y. Laws 1765 (repealed 1964).

25 The Debtor & Creditor Law provided:

> In this article, unless otherwise expressly stated, "obligation" includes a liability in tort; "obligor" includes a person liable for a tort; "obligee" includes a person having a right based on a tort. "Several obligors" means obligors severally bound for the same performance.

Id. § 231, ch. 833, § 231, [1928] N.Y. Laws 1765. The same wording was carried over into N.Y. GEN. OBLIG. LAW § 15-101 (McKinney 1964), *as amended, id.* § 15-101 (McKinney Supp. 1972).

26 Debtor & Creditor Law § 235, ch. 833, § 235, [1928] N.Y. Laws 1765 (repealed 1964).

27 *See id.* §§ 233-35, ch. 833, §§ 233-35, [1928] N.Y. Laws 1765; N.Y. GEN. OBLIG. LAW §§ 15-103 to -105 (McKinney 1964).

28 *See* note 25 *supra*. *See also* Sarine v. American Lumbermen's Mut. Cas. Co., 258 App. Div. 653, 17 N.Y.S.2d 754 (2d Dep't 1940).

29 *See, e.g.*, Rector of St. James Church v. City of New York, 261 App. Div. 614, 26 N.Y.S.2d 762 (2d Dep't 1941); Bossong v. Muhleman, 254 App. Div. 738, 3 N.Y.S.2d 992 (2d Dep't 1938). But see Berlow v. New York State Thruway Auth., 35 App. Div. 2d 336, 316 N.Y.S.2d 238 (3d Dep't 1970), *rev'd mem.*, 29 N.Y.2d 949, 280 N.E.2d 366, 329 N.Y.S.2d 579 (1972), which specifically rejected the contention that damages had to be liquidated before the sections applied to a tort situation. *Accord*, Lurie v. Goldman, 53 Misc. 2d 250, 278 N.Y.S.2d 549 (Sup. Ct. 1965).

30 *See* Malvica v. Blumenfeld, 28 N.Y.2d 851, 271 N.E.2d 227, 322 N.Y.S.2d 249 (1971).

The most recent attempt to eliminate confusion and interject fairness into the law of release is found in amended section 15-101 and new section 15-108 of the New York General Obligations Law.[31] As amended, section 15-101 omits references to tort claims and claimants in its definition of obligor.[32] Restricting the scope of section 15-105 to releases given to contract obligors only, the amendment thus eliminates the need to inquire whether damages were liquidated at the time of release.

More important, however, is the effect of section 15-108,[33] added specifically to deal with the effect of a discharge of liability given to a joint tortfeasor. Expressly applicable to both releases and covenants not to sue, the section provides that such writings affect only the liability of the party to whom the instrument is given.[34] Other tortfeasors can avail themselves of its effect only where express provision is so made.[35] The burden of proof on the issue of the release's effect is thus shifted from plaintiff to defendant.

Section 15-108 also affects the extent to which nonsettling tortfeasors are liable to the plaintiff. Apparently relying on a "compensation" test,[36] the section provides that the plaintiff's claim against those remaining liable is reduced only "to the extent of any amount stipulated

31 N.Y. GEN. OBLIG. LAW §§ 15-101, -108 (McKinney Supp. 1972); *see* N.Y. Leg. Doc. No. 65K (1972).

32 N.Y. GEN. OBLIG. LAW § 15-101 (McKinney Supp. 1972), *amending id.* § 15-101 (McKinney 1964).

33 *Id.* § 15-108 (McKinney Supp. 1972), *added by* ch. 830, § 3, [1972] N.Y. Laws 2532.

34 When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.

N.Y. GEN. OBLIG. LAW § 15-108 (McKinney Supp. 1972).

35 *Id.*

36 Absent application of the common law bar, courts generally employ one of two tests to determine whether in fact a release has resulted in full satisfaction of the releasor's claim. The "compensation" test compares the amount of consideration received with the estimated or liquidated damages actually incurred by the releasor. *See* Berlow v. New York State Thruway Auth., 35 App. Div. 2d 356, 316 N.Y.S.2d 238 (3d Dep't 1970), *rev'd mem.*, 29 N.Y.2d 949, 280 N.E.2d 366, 329 N.Y.S.2d 579 (1972). The "intent" test merely asks whether the parties intended the consideration to be in full satisfaction of the claim. *See* Gilbert v. Finch, 173 N.Y. 455, 66 N.E. 133 (1903). The decision of the court in Derby v. Prewitt, 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962), specifically indicated that either test was a satisfactory means of determining whether full compensation had been made. The sole concern of the court in such a case was to see that the plaintiff, although compensated, did not obtain what amounted to a double recovery.

in the release or the covenant, or in the amount of the consideration paid for it, whichever is greater."[37] Although this elimination of the pro rata rule encourages gratuitous releases,[38] it still prevents the plaintiff from achieving a double recovery for his injury.[39] In addition, such a device increases the attractiveness of early settlement, though at the expense of the tortfeasor who wishes to challenge the asserted claim or otherwise invoke his judicial rights.[40]

This ability to discharge certain tortfeasors for less than their proportional amount of liability may generate more difficulties than are resolved. Previously, contribution rights among joint tortfeasors never posed serious problems. Under the earlier statute, when no express reservation was made, the release operated to reduce the plaintiff's claim by the tortfeasor's pro rata share of liability. No need for contribution therefore arose.[41] When a plaintiff expressly reserved his rights against the nonsettling tortfeasors, however, the release operated to reduce the

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37 N.Y. GEN. OBLIG. LAW § 15-108 (McKinney Supp. 1972).

38 The 1939 version of the Uniform Contribution Among Tortfeasors Act was specifically changed in 1955 so that a release reduced the plaintiff's claim only by the amount of consideration given or the amount stated, instead of by the pro rata share of the releasee's liability. As is stated in the Commissioners' Note to § 4 of the revised version, the effect of the pro rata rule

> [h]as been to discourage settlements in joint tort cases, by making it impossible for one tortfeasor alone to take a release and close the file. Plaintiff's attorneys are said to refuse to accept any release which contains the provision reducing the damages "to the extent of the pro rata share of the released tortfeasor," because they have no way of knowing what they are giving up. The "pro rata share" cannot be determined in advance of judgment against the other tortfeasors. In many cases their chief reason for settling with one rather than another is that they hope to get more from the party with whom they do not settle.

UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4, Commissioners' Note (1955 version). Thus, the pro rata rule was discarded despite the potential for collusion and unfairness to remaining tortfeasors present in the revised version. N.Y. GEN. OBLIG. LAW § 15-108 (McKinney Supp. 1972) is substantially based on revised Uniform Act § 4. *See* note 34 *supra*.

39 Double recovery was also prevented under prior law in similar circumstances. *See, e.g.*, Livant v. Livant, 18 App. Div. 2d 383, 239 N.Y.S.2d 608 (1st Dep't), *appeal dismissed*, 13 N.Y.2d 894, 193 N.E.2d 503, 243 N.Y.S.2d 676 (1963). What is different, however, is that in situations in which the damages are unliquidated at the time of release, the possibility of obtaining a full monetary recovery from all persons liable is now real, rather than theoretical. *See* note 68 and accompanying text *infra*.

40 As in the case of a gratuitous release, or one for nominal consideration, the nonsettling tortfeasor is burdened with damages disproportionate to the degree or extent of his fault. The relief afforded by the contribution law is obviated by the effect of the release. *See* notes 18-21 and accompanying text *supra*.

41 Such was the case under former General Obligations Law § 15-105 (N.Y. GEN. OBLIG. LAW § 15-105 (McKinney 1964), *as amended, id.* § 15-105 (McKinney Supp. 1972)) and former Debtor & Creditor Law § 235, ch. 833, § 235, [1928] N.Y. Laws 1765 (repealed 1964). Since the pro rata share has already been deducted, there is no possible excess payment that can be made by the nonsettling party.

claim only by the consideration given. In such instances, contribution rights were easily circumvented by the injured party's failure to join the released party as a defendant in the action.[42] Impleader in such circumstances was unavailable to the defendant, and no pro rata allocation of liability was possible.[43] Thus, despite the relative fault of the parties, a plaintiff could require one defendant to bear the full brunt of liability and risk distribution.[44]

In its recent decision in *Dole v. Dow Chemical Co.*,[45] the New York Court of Appeals undertook to reform the law of contribution and remove the potential for abuse. In *Dole*, an employee of a milling company had succumbed to chemical fumes present in a recently fumigated storage bin. A wrongful death action was brought by the worker's administratrix seeking recovery solely from Dow, the manufacturer of the fumigant.[46] The defendant denied responsibility, and instead asserted that decedent's employer, George Urban Milling Company, was the negligent party. Thus, in a third-party complaint, Dow sought indemnification for any judgment that might be rendered against it on the basis that its negligence, if any, was merely secondary and passive in nature in comparison to that of the employer.[47] The Supreme Court, Special Term, denied Urban's motion to dismiss the third-party complaint but was unanimously reversed by the Appellate Division,[48] which held that

42 *See* Bailey v. Kew Queens Corp., 78 N.Y.S.2d 509 (Sup. Ct. 1947), *appeal dismissed*, 92 N.Y.S.2d 312 (1st Dep't 1949).

43 *See* notes 19-21 and accompanying text *supra*.

44 There is little apparent reason for allowing the plaintiff so decisively to control a remedy which clearly is intended for the benefit of defendants. Once the plaintiff has received full compensation, his interest in the litigation should logically be terminated. *See* Gregory, *Tort Contribution Practice in New York*, 20 CORNELL L.Q. 269 (1935).

45 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), *rev'g* 35 App. Div. 2d 149, 316 N.Y.S.2d 348 (4th Dep't 1970).

46 Plaintiff's decision to proceed solely against Dow Chemical was dictated by necessity. Under New York's Workmen's Compensation Law, the administratrix was precluded from seeking recovery from the deceased's employer. *See* N.Y. WORKMEN'S COMP. LAW § 11 (McKinney 1965).

47 This contention that the employer functioned as an active tortfeasor provided the only legal avenue for escaping full liability. *See* notes 20-21 and accompanying text *supra*. Precisely what constitutes active and passive negligence remains unclear. In McFall v. Compagnie Maritime Belge (Lloyd Royal) S.A., 304 N.Y. 314, 107 N.E.2d 463 (1952), it was held that passive negligence exists at least when the defendant is negligent merely in maintaining a dangerous condition without knowledge of its presence. Of importance is the "factual disparity" between the delinquency of the tortfeasors involved. Later cases have done little to improve upon this definition. *See, e.g.*, Jackson v. Associated Dry Goods Corp., 13 N.Y.2d 112, 116, 192 N.E.2d 167, 169, 242 N.Y.S.2d 210, 214 (1963): "Active negligence . . . is not determined by whether the conduct of the party seeking indemnification is affirmative or permissive, for acts of omission as well as acts of commission may constitute active negligence . . . ."

48 Dole v. Dow Chem. Co., 35 App. Div. 2d 149, 316 N.Y.S.2d 348 (4th Dep't 1970).

Dow's own active negligence prohibited such indemnification.[49] Reversing this decision, the Court of Appeals determined that impleader is proper whenever a third party is responsible for part of the negligence for which a defendant is cast in damages.[50] Following an apportionment of liability based on fault,[51] the defendant can recover from the impleaded party the amount of damages attributable to that party's actions.[52]

As established in *Dole*, the right of contribution remains personal to the defendant and cannot be affected or waived by design of the plaintiff.[53] Conversely, the right cannot function to increase or diminish plaintiff's recovery.[54] Indirectly, however, the *Dole* right of contribution has the potential to reduce significantly the benefits accruing to plaintiffs under General Obligations Law section 15-108. Although the statute permits a plaintiff to release a joint tortfeasor for less than his full apportioned liability,[55] it is clear under *Dole* that the remaining defendants' right to apportioned liability still remains.[56] Since this right will ultimately permit the nonsettling tortfeasor to extract a full pro rata share from the released tortfeasor, the latter obtains no financial

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49 *Id.* at 151-52, 316 N.Y.S.2d at 351.

50 The conclusion reached is that where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of responsibility in negligence between those parties.

30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

51 This apportionment of liability is expressly stated to be a question of fact for the jury. *Id.* at 149, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

52 The court stated that when there is an apportionment of liability made on the basis of relative fault, further contribution pursuant to N.Y. CIV. PRAC. LAW § 1401 (McKinney Supp. 1972) is expressly prohibited. 30 N.Y.2d at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391. This statement appears to render § 1401 a dead letter, since the right to contribution accrues only after a judgment has already been satisfied by a joint tortfeasor. *See* note 20 *supra*. Except where fault is clearly seen to be evenly attributable to all parties, there will always be recourse to the right of relative fault allocation, which accrues at the time the cause of action arises.

53 This rule is clear from the court's statement that the apportionment of responsibility can either be made in a separate action or as a separate and distinct issue in the prime action, with the defendant able to implead the third party under N.Y. CIV. PRAC. LAW § 1007 (McKinney 1963). 30 N.Y.2d at 149, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

54 *See* Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 30, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 855 (1972):

> It should, of course, be understood that this refinement of the rule of contribution does not apply to or change the plaintiff's right to recover against any joint tort-feasor in a separate or common action the total amount of his damage suffered and not compensated.

55 N.Y. GEN. OBLIG. LAW § 15-108 (McKinney Supp. 1972).

56 *See* note 53 *supra*.

advantage through settlement. On the contrary, besides running the risk of overpayment,[57] the releasee incurs the additional expense of trial. Accordingly, all inducement to settle vanishes.

Any just resolution of the problem raised by this conflict between *Dole* and the statute must entail an evaluation of the competing public policies involved. The *Dole* rule of relative responsibility among tortfeasors is predicated on the principle of fairness and the social advantage gained through proper liability distribution.[58] This policy was largely a response to the inequitable practice by some plaintiffs of pursuing certain tortfeasors while ignoring others, thereby placing the entire burden on the former group.[59] If a plaintiff is still able to accomplish this result by the artifice of release, the *Dole* holding will be critically undermined. Section 15-108, however, is predicated upon the long-standing public policy[60] favoring the settlement of claims and avoidance of the burdens of litigation.[61] Although *Dole* does not affect the plaintiff's incentive to compromise, it does destroy the defendant's motivation.[62] In addition to the monetary hardships such a conse-

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57 Two distinct situations can arise in which a settling tortfeasor will be subjected to overpayment. The amount given for the release may be (*1*) greater than the total amount of damages assessed by the jury, or (*2*) less than the total amount of damages but more than that fraction allocable to the releasee. If situation (*1*) occurs, the remaining tortfeasors pay nothing to plaintiff. Moreover, the releasee has no basis for compelling the others to share the loss, since his payment was voluntarily made. *See* Yawger v. American Sur. Co., 212 N.Y. 292, 106 N.E. 64 (1914). For the same reasons, if situation (*2*) occurs, the nonsettling tortfeasors need only pay the difference, with the releasee once again having no recourse through contribution. *See generally* Note, *Consequences of Proceeding Separately Against Concurrent Tortfeasors*, 68 HARV. L. REV. 697 (1955); 55 MICH. L. REV. 1200 (1957).

58 "'The present system runs counter to tort policy goals of deterrence, equitable loss sharing by all the wrongdoers, effective loss distribution over a large segment of society, and rapid compensation . . . .'" 30 N.Y.2d at 150, 282 N.E.2d at 293, 331 N.Y.S.2d at 389, *quoting* Comment, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490, 516 (1969).

59 The court recognized that some of the rigors of the contribution law under N.Y. CIV. PRAC. LAW § 1401 (McKinney Supp. 1972) had been mitigated through implementation of the active-passive negligence concept. *Cf.* note 21 *supra*. However, since this formulation merely shifted the liability *in toto* from one tortfeasor to another and in addition was vaguely defined, the court regarded it as a most inadequate and inequitable solution to the problem posed. 30 N.Y.2d at 148-49, 282 N.Y.2d at 292, 331 N.Y.S.2d at 387.

60 *See* Post v. Thomas, 212 N.Y. 264, 106 N.E. 69 (1914); Weil v. Weil, 227 App. Div. 378, 237 N.Y.S. 668 (1st Dep't 1929); Levey v. Babb, 39 Misc. 2d 648, 241 N.Y.S.2d 642 (Sup. Ct. 1963); Havighurst, *supra* note 5, at 20-22. *See generally* 55 MICH. L. REV. 1200 (1957); 12 RUTGERS L. REV. 533 (1958).

61 *See* note 38 *supra*.

62 *See* note 57 and accompanying text *supra*.

quence imposes on injured parties,[63] a decrease in settlements exacerbates the problem of already overcrowded court dockets.[64]

Although the conflict posed lends itself to several judicial solutions,[65] the only acceptable alternative is that which harmonizes, as far as practicable, the competing policies involved.[66] Accordingly, a

63 As is pointed out by proponents of no-fault insurance, one of the main deficiencies of the present system is that the injured party may not be able to survive financially until his rights are enforced by litigation. *See, e.g.*, A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COST AND PAYMENTS 221 (1964); INSURANCE DEP'T, STATE OF NEW YORK, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? 68 (1970).

64 *See, e.g.*, INSTITUTE OF JUDICAL ADMINISTRATION, CALENDAR STATUS STUDY—1972: STATE TRIAL COURTS OF GENERAL JURISDICTION—PERSONAL INJURY JURY CASES 9-11 (1972); Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 29, 30-54 (American Assembly ed. 1965).

65 The situation as it now stands in New York is unworkable and impractical. The New Jersey Supreme Court, when confronted with a strikingly similar quandary, felt that there were two viable alternatives. The first, set out in Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954), was to reduce the releasor's claim by the pro rata share of the releasee's liability or the amount of consideration given, whichever is greater. This solution avoided subjecting the settling tortfeasor to demands for contribution, a result which the court foresaw "would have a stifling effect upon efforts at compromise and settlement, contrary to the policy of our law which strongly favors disposition of disputes by compromise and settlement." *Id.* at 92-93, 110 A.2d at 36. That such a rule would make plaintiffs less willing to compromise was not regarded as a substantial problem. Absent collusion, a plaintiff makes a settlement on the basis of his appraisal of the risks of recovery "and will hardly be deterred from it because it may later eventuate that he accepted less than the settler's *pro rata* share." *Id.* at 93, 110 A.2d at 37.

The second alternative was suggested by Chief Justice Weintraub in Judson v. Peoples Bank & Trust Co., 25 N.J. 17, 134 A.2d 761 (1957). Although Weintraub, writing for the majority, continued to apply the formula from the first *Judson* case, he realized that it was a less than satisfactory solution since there still remained some chilling effect on settlements. In its stead, he recommended that a "good faith" settlement be regarded as completely discharging the tortfeasor, but reducing the plaintiff's claim only by the consideration actually received. *Id.* at 36, 134 A.2d at 771. Such a scheme, it was reasoned, would encourage settlements while burdening the nonsettling party only slightly. The difficulty with this recommendation, however, is that one joint tortfeasor may still be subjected to bearing a greatly disproportionate share of the liability, despite the presence of good faith. More important, the vagueness of a good faith standard is certain to generate considerable litigation. In addition, because intent is so difficult to prove, such a criterion will probably breed collusion. *See* 12 RUTGERS L. REV. 553, 536-37 (1958).

Wisconsin, which, like New York, has adopted a rule of relative fault among tortfeasors (*see* Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962)), has also found the pro rata alternative the most practical and equitable solution to the competing problems of contribution rights and promotion of settlements. *See* Peiffer v. Allstate Ins. Co., 51 Wis. 2d 329, 187 N.W.2d 182 (1971); Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). Similar to the court in the first *Judson* case, the Wisconsin court in *Peiffer* foresaw that the pro rata rule would further "the goal of encouraging settlements of claims against joint tort feasors." 51 Wis. 2d at 338, 187 N.W.2d at 186.

66 *See* McKenna v. Austin, 134 F.2d 659, 665 (D.C. Cir. 1943): "The problem is to blend the themes of compromise and contribution, maintaining the essential integrity of each as far as possible."

release or covenant should constitute a full satisfaction of a tortfeasor's fractional share of the liability. The plaintiff should retain a cause of action against the nonsettling tortfeasors only for their proportionate share of the liability as determined by the jury. This would eliminate the need for impleader. The plaintiff, with the opportunity to maximize the proportionate fault of defendants in his proof, would thus perform the task previously undertaken by the impleaded releasee.[67]

Although such a construction of New York General Obligations Law section 15-108 does jeopardize a plaintiff's right to full recovery, prompt settlement may help compensate for any monetary loss incurred.[68] Moreover, in view of the threat of large jury verdicts and the pressure on insurers to accept settlement offers within policy limits,[69] an injured party would still wield significant bargaining power. Finally, such a resolution of the matter would extinguish the unfair and unnecessary possibility of a gratuitous release by the plaintiff. Although this practice may have the support of tradition, it has outlived its justification and conflicts with the modern emphasis on fairness.[70]

CONCLUSION

Although New York General Obligations Law section 15-108 attempts to simplify the law of release and make settlement a more equitable and attractive possibility, it has failed in its objectives. As it is presently formulated, the provision can be rendered operationally viable only by a restrictive and somewhat distorted construction of its provisions. For this reason, the New York legislature should reconsider the statute, and should endeavor to rewrite it along lines which comport with the *Dole* decision and the compromise of public policy considerations brought into focus by the emergence of this conflict.

Randy Jan Morell

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67 Since both the releasee, if subjected to apportionment under *Dole*, and the releasor, if subjected to the pro rata rule, are interested in maximizing the fault attributable to the other tortfeasors, the absence of the releasee from the litigation should not adversely affect plaintiff's ultimate recovery.

68 It has been suggested that certainty and speed of recovery in themselves are valuable rights to plaintiffs and serve as inducements to settlement. *See* Havighurst, *supra* note 5, at 17-20. *See also* note 63 *supra*.

69 *See generally* Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954); Note, *Liabilities of an Insurance Carrier in Excess of Coverage*, 3 WM. & MARY L. REV. 357 (1962).

70 *See* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); note 58 and accompanying text *supra*.